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6                   **IN THE UNITED STATES DISTRICT COURT**  
7                   **FOR THE DISTRICT OF ARIZONA**

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9                   Jason Fritch,

10                   No. CV-21-00509-TUC-JGZ (JR)

11                   Plaintiff,

12                   **ORDER**

13                   v.

14                   Orion Manufactured Housing Specialists  
15                   Incorporated, et al.,

16                   Defendants.

17                   This case arises from Defendants Orion Manufactured Housing Specialists, Inc.  
18                   and L. James Miller's admitted failure to pay overtime to their employee, Plaintiff Jason  
19                   Fritch, pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219. On  
20                   September 15, 2022, Fritch filed the pending Motion for Summary Judgment, which is  
21                   fully briefed. (*See* Docs. 67–68, 71–73.) The only issue to be determined is damages,  
22                   including how many hours Fritch worked and the amount of wages owed to him. (*See*  
23                   Docs. 68 at 1–2; 71 at 2–3.)

24                   On February 13, 2023, Magistrate Judge Jacqueline M. Rateau issued a Report and  
25                   Recommendation (R&R), recommending the Court deny Fritch's Motion for Summary  
26                   Judgment. (Doc. 78.) Fritch filed an Objection, arguing the Magistrate Judge erred by  
27                   finding that an undisclosed payroll ledger would be admissible at trial. (Doc. 82.) Orion  
28                   Manufactured Housing Specialists, Inc. and L. James Miller filed a Response. (Doc. 86.)  
                 After an independent review of the record and R&R, the Court will overrule Fritch's  
                 Objection, adopt in part the R&R, and deny Fritch's Motion for Summary Judgment.

1       **I. Legal Standard**

2       When reviewing a magistrate judge’s R&R, this Court “may accept, reject, or  
 3 modify, in whole or in part the findings or recommendations made by the magistrate  
 4 judge.” 28 U.S.C. § 636(b)(1). “[T]he district judge must review the magistrate judge’s  
 5 findings and recommendations de novo *if objection is made*, but not otherwise.” *United*  
 6 *States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). District courts are not  
 7 required to conduct “any review at all . . . of any issue that is not the subject of an  
 8 objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see also* 28 U.S.C. § 636(b)(1);  
 9 Fed. R. Civ. P. 72. Further, a party is not entitled as of right to de novo review of  
 10 evidence or arguments which are raised for the first time in an objection to the R&R, and  
 11 the Court’s decision to consider newly raised arguments is discretionary. *Brown v. Roe*,  
 12 279 F.3d 742, 744 (9th Cir. 2002).

13       Summary judgment will be granted when the movant has shown “that there is no  
 14 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
 15 of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A  
 16 dispute is “genuine” if there is sufficient evidence for a reasonable jury to return a verdict  
 17 in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
 18 (1986). A fact is “material” if it might affect the outcome of the suit under the governing  
 19 law. *Id.* There is no genuine issue of material fact when a party fails to establish an  
 20 element essential to that party’s case and on which that party will bear the burden of  
 21 proof at trial. *Celotex Corp.*, 477 U.S. at 322–23.

22       At summary judgment, the court must not weigh the evidence but determine  
 23 whether there is a genuine issue of material fact for trial. *Anderson*, 477 U.S. at 294. A  
 24 court presented with a motion for summary judgment must view the facts and draw  
 25 reasonable inferences in the light most favorable to the nonmoving party. *Scott v. Harris*,  
 26 550 U.S. 372, 378 (2007).

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1       **II. Background<sup>1</sup>**

2           From about May 2020 to August 2021, Jason Fritch worked as a full-time  
 3 employee for Orion Manufactured Housing Specialists, Inc. and its President L. James  
 4 Miller (collectively Orion). (Docs. 68 ¶¶ 1–2; 72 ¶¶ 1–2.) Orion’s office manager and  
 5 bookkeeper is Nancy Brown. (Docs. 68 ¶ 3; 72 ¶ 3.) When Brown began working for  
 6 Orion about 25 years ago, Miller’s wife instructed Brown to pay employees in paychecks  
 7 for hours worked up to 40 hours per week and pay employees in cash for all hours  
 8 worked over 40 hours per week. (Docs. 68 ¶¶ 4–5; 72 ¶¶ 4–5.) Orion kept track of the  
 9 time that employees worked on timecards but did not put overtime hours worked on  
 10 employee paystubs. (Docs. 68 ¶¶ 6, 10; 72 ¶¶ 6, 10.) After he was served with this  
 11 lawsuit, Miller shredded all the timecards in part because he did not want to produce  
 12 them in litigation. (Docs. 68 ¶¶ 8–9; 72 ¶¶ 8–9.)

13           Orion knew it was illegal not to pay its employees time-and-a-half for overtime  
 14 hours worked. (Docs. 68 ¶ 12; 72 ¶ 12.) Orion paid overtime hours in cash rather than in  
 15 paychecks in an attempt to sidestep the law. (Docs. 68 ¶ 14; 72 ¶ 14.) In doing so, Orion  
 16 failed to pay any state or federal taxes on all cash payments to employees. (Docs. 68 ¶ 15;  
 17 72 ¶ 15.) Fritch routinely worked over 40 hours per week. (Docs. 68 ¶ 19; 72 ¶ 19.) Orion  
 18 violated the FLSA by failing to pay Fritch time-and-a-half for overtime hours worked.  
 19 (Docs. 68 ¶ 20; 72 ¶ 20.) When Fritch worked over 40 hours in a week, Orion would pay  
 20 him straight-time in cash for the overtime hours. (Docs. 68 ¶ 21; 72 ¶ 21.)

21           During discovery, Orion produced Fritch’s paystubs, W-2 Forms, and a two-page  
 22 spreadsheet entitled “PAYROLL RECORDS FOR JASON FRITCH,” which included  
 23 columns for week worked, check amount, hours worked, and date paid. (Doc. 68-6; *see*  
 24 *also* Docs. 68 ¶¶ 23–24; 72 ¶¶ 23–24.) Orion admits it is in violation of 29 C.F.R. §  
 25 516.2(a)(7) because it does not have records of the hours Fritch worked per day. (Docs.  
 26 68 ¶ 25; 72 ¶ 25.) Orion has also admitted liability under the FLSA, conceding that no  
 27 exemption applies in this case, Fritch is entitled to liquidated damages, and it acted

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28       <sup>1</sup> The facts stated below are undisputed unless otherwise noted.

1 willfully. (Doc. 68-7 at 4.)

2 Orion asserts the two-page payroll spreadsheet is an excerpt of Orion's payroll  
 3 ledger and that Brown created and maintained the ledger as Fritch submitted his  
 4 timecards. (Docs. 82-1 at 33–34; 86 at 5–6.) Fritch asserts the two-page payroll  
 5 spreadsheet was created just for this litigation and was not created during the weeks  
 6 Fritch worked. (Docs. 68 ¶ 28; 72 ¶ 28.) Fritch also asserts Orion failed to disclose the  
 7 payroll ledger. (Doc. 82 at 3.) Orion implies that the ledger was available for Fritch to  
 8 examine. (Doc. 86 at 5.)

9 Fritch estimates that Orion owes him for 500 hours of overtime and 151.5 hours of  
 10 overtime for which he received no pay at all. (Doc. 68 ¶¶ 29–30.) Fritch asserts he  
 11 received no pay for working unscheduled Saturday shifts and driving to and from job  
 12 locations. (Docs. 68 ¶¶ 32–33.) Orion asserts that Fritch worked 348.5 hours of overtime  
 13 and that Fritch has already agreed that he received straight-time pay in cash for any  
 14 overtime hours worked. (Doc. 86 at 2–3.)

### 15 III. Discussion

16 In *Anderson v. Mt. Clemens Pottery Co.*, the Supreme Court recognized the  
 17 difficult bind employees often face when bringing wage-and-hour claims against  
 18 employers that failed to maintain proper timekeeping records. 328 U.S. 680, 687 (1946).  
 19 To address this problem, the Court established a burden-shifting framework for actions in  
 20 which the employer has kept inadequate or inaccurate records. *Id.* at 687–88. First, the  
 21 employee must produce “sufficient evidence to show the amount and extent of that work  
 22 as a matter of just and reasonable inference.” *Id.* at 687. Next, the employer must produce  
 23 “evidence of the precise amount of work performed” or “evidence to negative the  
 24 reasonableness of the inference to be drawn from the employee’s evidence.” *Id.* at 687–  
 25 88. “If the employer fails to produce such evidence, the court may then award damages to  
 26 the employee, even though the result be only approximate.” *Id.* at 688.

27 In his Objection, Fritch argues the Magistrate Judge erred by confusing the  
 28 undisclosed payroll ledger with the disclosed payroll spreadsheet and concluding that the

1 undisclosed ledger would be admissible at trial. (Doc. 82 at 8–10.) Fritch argues that,  
 2 under the *Mt. Clemens* burden-shifting framework, his estimate of hours worked is  
 3 entitled to a presumption, which Orion cannot rebut at trial because its payroll ledger and  
 4 spreadsheet are inadmissible. (*Id.*) Because Orion has no records to rebut his estimate,  
 5 Fritch contends there is no genuine dispute of material fact for trial. (*Id.* at 10–11.)

6 In its Response, Orion argues that inconsistencies in Fritch’s sworn statements  
 7 raise a genuine dispute of material fact that must be resolved at trial. (Doc. 86 at 3, 6.)  
 8 Orion also argues that its payroll ledger is admissible as a business record under Federal  
 9 Rule of Evidence 806(6) and its payroll spreadsheet, as an excerpt of the ledger, is  
 10 admissible as a printout of business records under Rule 806(6) and a summary of  
 11 voluminous records under Rule 1006. (*Id.* at 5–6.) Orion contends that these admissible  
 12 documents rebut Fritch’s estimate of hours worked and raise a genuine dispute of  
 13 material fact for trial. (*Id.*)

14 The Court concludes that the inconsistencies in Fritch’s sworn statements preclude  
 15 summary judgment. In his Verified Complaint, Fritch stated that Miller would give him  
 16 an envelope containing straight-time cash payments for “any hours worked over 40 hours  
 17 in a given workweek.” (Doc. 1 ¶¶ 28, 49; *see also* Doc. 11 ¶¶ 32, 55.) However, in an  
 18 affidavit submitted in support of his Motion for Summary Judgment, Fritch states Miller  
 19 did not pay him straight-time for all overtime hours, specifically when he worked  
 20 unscheduled Saturday shifts and drove to and from job locations. (Doc. 68-4 ¶¶ 7–9.)  
 21 Orion asserts—consistent with Fritch’s Verified Complaint—that it paid Fritch straight-  
 22 time for all overtime hours worked. (*See* Doc. 1 ¶¶ 28, 49; 86 at 3.) The conflict between  
 23 Fritch’s sworn statements calls into question the reasonableness of Fritch’s most recent  
 24 estimate of hours worked. *See Mt. Clemens*, 328 U.S. at 687–88. A genuine dispute of  
 25 material fact thus remains as to whether Fritch worked some overtime hours unpaid or  
 26 received straight-time cash payments for all overtime hours worked.

27 The Court makes no ruling on the admissibility of the ledger or spreadsheet.<sup>2</sup> At  
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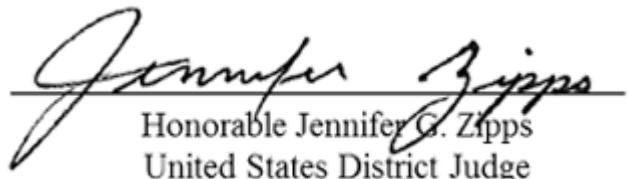
<sup>2</sup> The Court also declines to consider the new evidence and arguments related to the

1 the summary judgment stage, a court may exclude evidence if it is clear that the evidence  
2 cannot be presented in any admissible form at trial. *See Fed. R. Civ. P. 56(c)(2)* (“A party  
3 may object that the material cited to support or dispute a fact cannot be presented in a  
4 form that would be admissible in evidence.”); *Fed. Deposit Ins. Corp. v. N.H. Ins. Co.*,  
5 953 F.2d 478, 485 (9th Cir. 1991) (“[T]he nonmoving party need not produce evidence in  
6 a form that would be admissible at trial in order to avoid summary judgment.”). The  
7 parties’ filings on summary judgment do not provide a sufficient basis for the Court to  
8 determine that Orion’s payroll ledger and spreadsheet, or the information contained  
9 therein, cannot be admitted at trial.

10 Accordingly, **IT IS ORDERED:**

11 1. Fritch’s Objection (Doc. 82) is **overruled**.  
12 2. The Report and Recommendation (Doc. 78) is **adopted** consistent with this  
13 Order.  
14 3. Fritch’s Motion for Summary Judgment (Doc. 67) is **denied**.  
15 4. A telephonic Pretrial Hearing is set for **Thursday, June 1, 2023, at 1:30**  
16 **p.m.** Parties will receive a notification with call-in instructions prior to the Pretrial  
17 Hearing. The parties shall be prepared to discuss the setting of a trial date.  
18 5. The parties’ Joint Proposed Pretrial Order is due **30 days** from the date of  
19 this Order. The Court’s Joint Proposed Pretrial Order form can be found at:  
20 <https://perma.cc/SK55-JKK4>.

21 Dated this 25th day of May, 2023.

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Honorable Jennifer G. Ziggs  
United States District Judge

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payroll ledger and spreadsheet, which the parties raised in the Objection and Response to  
the R&R. *See Brown*, 279 F.3d at 744. These evidentiary and spoliation issues are best  
left for resolution by pretrial motions.